conditions with which the appellant must strictly comply. *Etchells v. Wainwright* (1904) 76 Conn. 534, 57 Atl. 121. Some courts also seem to base the denial of a new trial in such cases on policy. *Cf. Bingman v. Clark* (1916) 178 Iowa, 1129, 159 N. W. 172. The majority view, however, in both civil and criminal cases, affords the appellant relief where the record necessary for a review of the case is lost or unobtainable. These courts allow a new trial as a matter of justice and as within the inherent or incidental powers of the court, not based upon a statutory provision. *Bailey v. United States* (1909) 3 Okla. Cr. App. 175, 104 Pac. 917; *Cf. Richardson v. State* (1907) 15 Wyo. 465, 89 Pac. 1027. A few jurisdictions have arrived at the same conclusion by a liberal construction of the statutory grounds for appeal. *Nelson v. Marshall* (1904) 77 Vt. 44, 58 Atl. 793. It seems that this might readily have been done in the principal case. In civil cases, much may be said in favor of the rule in the instant case, because it would not be equitable to transfer the hardship of the appellant to the appellee, in addition to compelling him to undergo the expense of a second trial. However, in criminal cases, both principle and policy support the majority doctrine. No property rights would be interfered with; the state is simply exacting punishment. It is submitted that it is a mockery of justice to deny the appellant any opportunity of relief on a mere technicality in a criminal case.

TRUSTS—CHARITABLE TRUSTS—TRUST FOR "BENEVOLENT PURPOSES" UNCERTAIN AND VOID.—A gift was made by will to trustees of a church in trust to use the income "for support of the church or such benevolent purposes as the trustees of said church shall direct." *Held*, that as the trustees had discretion to use for benevolent purposes which would include purposes not strictly charitable, the gift was not a charitable trust and was therefore void for uncertainty. *Smith v. Pond* (1919, N. J. Ch.) 107 Atl. 800.

The court correctly held that general discretion given a trustee to select any charity does not render the trust void. *Re Pardue* [1906] 2 Ch. 184; *Gill v. Atty. Gen.* (1908) 197 Mass. 232, 83 N. E. 676; see *Re Dulles* (1907) 218 Pa. St. 162, 167, 67 Atl. 49, also 12 L. R. A. (N. S.) 1177, note. *Contra, Bristol v. Bristol* (1885) 53 Conn. 242, 5 Atl. 687 (by a divided court); *Hadley v. Forsee* (1907) 203 Mo. 418, 101 S. W. 59; see also 14 L. R. A. (N. S.) 49, note. Its holding that where a non-charitable purpose is included with a charitable purpose the entire trust fails, since the trustees cannot be compelled, against the donor's intent, to apply the fund to the charitable purpose, likewise accords with the authorities. *Morice v Durham* (1804, Eng. Ch.) 9 Ves. 399, 10 Ves. 522; *Minot v. Atty. Gen.* (1905) 189 Mass. 176, 75 N. E. 149; cases collected, 11 C. J. 330. The court was bound by previous authorities in New Jersey to hold that "benevolent" was more inclusive than "charitable," although it was strongly of the impression that in so doing it was frustrating the wishes of the testatrix. It would seem more in accord with the probable intention of testators to hold "benevolent," as here used, synonymous with "charitable," and this has been so held. *Suter v. Hilliard* (1852) 132 Mass. 412; *Fox v. Gibbs* (1893) 86 Me. 87, 29 Atl. 940; see *Re Hinckley* (1881) 58 Calif. 457, 507. But a result similar to that of the principal case has been reached in other cases. *Adye v. Smith* (1876) 44 Conn. 60; *James v. Allen* (1817, Eng. Ch.) 3 Meriv. 17, 36 Reprint, 7; see 7 C. J. 1140, 1141; also Sanger, *Remoteness and Charitable Gifts* (1919) 29 YALE LAW JOURNAL, 46.

WILLS AND ADMINISTRATION—EXECUTORS—SETTLEMENT OF ACCOUNT—ATTORNEYS' FEES.—An executor employed a firm of attorneys to prosecute an action to recover damages for the wrongful death of his testator. It was agreed that

the attorneys should receive a contingent fee of one-third of the amount recovered. Approximately $82,000 was recovered, one-third of which the executor paid the attorneys. He then filed his account and instituted proceedings for its judicial settlement. Objections were raised by the beneficiaries on the ground that the sum paid for attorneys' fees was unreasonable. The surrogate appointed a referee who found $15,500 to be a reasonable compensation. *Held,* that the executor should be credited with only that amount. Shearn, J. *dissenting. In re Meng* (1919, App. Div.) 176 N. Y. Supp. 290.

It is settled beyond dispute that an executor cannot bind the estate by his contract, although it was made in the interest and for the benefit of the estate. *Austin v. Munro* (1872) 47 N. Y. 360; *Platt v. Platt* (1887) 105 N. Y. 488, 12 N. E. 22. But he may bring an action for the wrongful death of the testator and, of course, is expected to employ counsel. A state statute provided, in the instant case, that "the reasonable expenses of the action may be fixed by the surrogate . . . and may be deducted from the recovery." The question arises as of what time this reasonableness is to be determined. In tort actions, the standard of reasonableness of a man's action is applied as of the time when the tort occurred, not on what are later found to be the facts. See Holmes, *The Common Law* (1881) 111. If the analogy is applied to cases like the instant one, it would seem that the reasonableness of the attorneys' fee must be determined as of the time when the contract was made, and not after recovery in the action. The majority of the court appears to have disregarded this point, which was made in the dissenting opinion. In this respect, it is believed that the decision of the majority was erroneous. It is agreed, however, that the estate was not bound by the contract. Contingent fees are usual in this class of cases, and fees even of more than thirty-three and one-third *per cent.* have been held to be reasonable in actions of the same nature. *Cf. In re Weber* (1918, Surr. Ct.) 102 Misc. 635, 170 N. Y. Supp. 293. Therefore, it is submitted that the contingent fee agreed upon in the principal case was reasonable at the time the contract was made, and that the surrogate should have been precluded, in the absence of fraud, etc., from holding otherwise. If the rule laid down in the present case is adopted, it would be difficult for an executor to protect himself in similar circumstances. A trustee may limit his liability on contracts made in behalf of the estate to the amount that he will be reimbursed from the estate. See (1915) 28 HARV. L. REV. 725, 739. This doctrine has been upheld in the case of a contract for the service of attorneys employed by a trustee. *Brackett v. Ostrander* (1908) 126 App. Div. 529, 110 N. Y. Supp. 779. But even if the doctrine were extended to include executors, there would be the practical difficulty of obtaining competent attorneys on such a basis of compensation. An estate in course of administration has not the credit and standing of a business trust. It would seem, then, for practical reasons, that the statute should be interpreted as indicated above.